No. 94-456

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In the Supreme Court of the United States

OCTOBER TERM, 1994

HAZEL W. BUNCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the United States was entitled to summary judgment on petitioners' claim that an Internal Revenue Service officer deliberately delayed processing their estate tax settlement offer in an attempt to coerce their counsel into obtaining a job for the officer's daughter.

2. Whether the trial court abused its discretion in declining to permit additional discovery requested by petitioners.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the United States Court of Federal Claims (Pet. App. 3a-24a) is reported at 28 Ct. Fed. Cl. 500.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1994. The petition for rehearing and suggestion for rehearing en banc was denied on June 13, 1994 (Pet. App. 26a). The petition for a writ of certiorari was filed on September 12, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Charlotte B. Major died in 1984. Among the assets she owned at the time of her death were public housing bonds, generally referred to as "Haffner" bonds.[1] Petitioners, who are the executors of decedent's estate, took the position on the estate's federal estate tax return that the value of such bonds was exempt from the federal estate tax and excluded the value of the Haffner bonds from the gross estate. On audit, the Internal Revenue Service included the full value of the bonds in decedent's gross estate (Pet. App. 4a).

On February 27, 1987, two attorneys who represented petitioners, Suzanne Feigert and Jonathan Blattmachr, attended a settlement conference concerning the estate's federal estate tax liability at the New York City Appeals Office of the Internal Revenue Service. Ms. Feigert and Mr. Blattmachr met with an appeals officer, Leonard Hershkowitz. The appeals officer did not possess settlement authority. Instead, he made recommendations concerning the action to be taken on settlement offers to his supervisor, Benjamin Brancato, an Associate Chief of the appeals office (Pet. App. 5a; C.A. App. 132-134, 240, 275).

Consistent with settlements by that office of other cases involving Haffner bonds, the appeals officer stated that he would be willing to settle the case by including 60 percent of the value of the Haffner bonds in decedent's gross estate. Ms. Feigert's affidavit states that she and

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[1] So-called "Haffner" bonds are obligations issued by certain state and local public housing agencies pursuant to the United States Housing Act of 1937, ch. 896, § 5(e), 50 Stat. 890, as amended. See *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 352 (1988).

Mr. Blattmachr told the appeals officer that they would recommend settlement on those terms (Pet. App. 5a; C.A. App. 222-223).

According to the affidavit of Mr. Blattmachr, upon conclusion of the settlement discussions, the appeals officer indicated that he had a daughter in law school and inquired whether their law firm might offer her a job. In response, Mr. Blattmachr stated that he "would be glad to forward [the daughter's] resume to [the firm's hiring] committee," and later did so (Pet. App. 5a; C.A. App. 228-229). There was never any other communication between the parties on this matter, and the appeals officer's daughter was not hired by the firm (Pet. App. 5a-6a; C.A. App. 221-229).

Petitioners submitted a formal settlement offer to the Internal Revenue Service on Form 890-AD (a form used to effect settlements of estate tax liabilities), reflecting a deficiency in tax computed in accordance with the proposed settlement (Pet. App. 5a; C.A. App. 224). Ms. Feigert's affidavit states that, (i) on March 3, 1987, the appeals officer informed her that acceptance of petitioners' calculations was subject to his review of the estate tax audit report and, (ii) on April 14, 1987, the appeals officer told her that he had just received the audit report and would close the case within a week or two (Pet. App. 6a; C.A. App. 224-225).

Some time before April 28, 1987, Mr. Brancato telephoned the National Office of the Internal Revenue Service concerning possible settlement in another case involving Haffner bonds. He was advised by the National Office not to settle cases involving Haffner bond issues and that a memorandum to that effect would soon be issued (Pet. App. 4a-5a; C.A. App. 132-134, 273-275). In turn, Mr. Brancato informed the appeals officer that he would no longer accept settlement offers in cases

involving Haffner bonds (C.A. App. 275, 307). On April 28, 1987, the National Office of the Internal Revenue Service issued a memorandum instructing all regional appeals offices that no further Haffner bond cases should be settled (Pet. App. 4a; C.A. App. 478-479). The memorandum was received by the New York Appeals Office on May 6, 1987 (C.A. App. 479). Mr. Brancato stated in his affidavit that he did not execute the settlement offer submitted on Form 890-AD by petitioners (C.A. App. 132-133).

Earlier during the same year, the representatives of a different estate that held Haffner bonds (the Heydon estate) attended a settlement conference in the New York City Appeals Office. The representatives of the Heydon estate thereafter executed a Form 890-AD on April 24, 1987, and received a closing letter dated May 11, 1987, confirming the settlement (Pet. App. 6a; C.A. App. 230-233).

2. Petitioners paid the tax that resulted from including the full value of the Haffner bonds in decedent's estate and filed a claim for refund of the full amount of the tax (Pet. App. 6a; C.A. App. 44). On March 23, 1988, this Court entered its decision in *United States* v. *Wells Fargo Bank*, 485 U.S. 351, holding that Haffner bonds are not exempt from the federal estate tax. The Internal Revenue Service thereafter denied petitioners' claim for refund (Pet. App. 6a; C.A. App. 153), and petitioners brought this suit in the United States Court of Federal Claims seeking a refund based on inclusion in the estate of 60 percent of the value of the Haffner bonds (Pet. App. 6a).

The United States filed a motion for summary judgment and also sought a stay of discovery pending disposition of the motion for summary judgment. Petitioners did not file a response to the government's

motion to stay discovery, which the court granted. Petitioners also did not seek reconsideration of the order granting the stay (Pet. App. 22a). Instead, as part of their opposition to the government's motion for summary judgment, petitioners' counsel filed an affidavit pursuant to Ct. Fed. Cl. R. 56(g) (the counterpart in the rules of the Court of Federal Claims to Fed. R. Civ. P. 56(f)), stating that "Mr. Hershkowitz's deposition is necessary before this summary judgment motion can be determined" (Pet. App. 32a).

3. The court granted the government's motion for summary judgment. Stating that settlement discretion must be exercised within the constraints of the equal protection component of the due process clause of the Fifth Amendment (Pet. App. 18a-19a), the court concluded that, in order to establish an abuse of settlement discretion, petitioners "must show both 1) that other similarly situated taxpayers have received more favorable settlements *and* 2) that the IRS intentionally singled out plaintiffs for arbitrary or irrational reasons" (*id.* at 21a). The court concluded that petitioners failed to demonstrate the existence of a genuine issue of material fact under that standard.

With respect to petitioners' assertion that the appeals officer blocked settlement in an effort to coerce their lawyers into hiring his daughter (Pet. App. 15a-16a), the court observed that the affidavits of Ms. Feigert and Mr. Blattmachr indicated that there were no communications concerning this matter after the first meeting and that petitioners had "not substantiated their charge of improper influence with even a shred of evidence" (*id.* at 16a). In addition, the court stated that the Rule 56(g) affidavit of petitioners' counsel requesting further discovery was "unconvincing" and concluded that there was no need to allow additional discovery "in order for

plaintiffs to investigate how their own lawyers were influenced" (*ibid.*).[2]

4. The court of appeals affirmed *per curiam* (Pet. App. 1a-2a). Petitioners filed a petition for rehearing and a suggestion for rehearing *en banc*, which the court denied (*id.* at 26a).

ARGUMENT

The decision of the courts below is correct and does not conflict with the decision of any other court. Further review is therefore not warranted.

1. Petitioners contend that the "solicitation of favors" by the appeals officer, coupled with a faster processing of settlement in another case involving Haffner bonds, was "more than enough circumstantial evidence" to support a finding that the appeals officer deliberately blocked settlement in an effort to coerce petitioners' counsel into hiring his daughter (Pet. 16). That purely factual contention was rejected by both courts below and does not merit further review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

Moreover, petitioners' factual contention is without merit. The record shows that petitioners' settlement

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[2] The court also rejected petitioners' claim that the government was estopped from denying that a settlement had been reached (Pet. App. 8a-15a). The court further rejected petitioners' claim that settlement in the Heydon estate case after adoption of the national no-settlement policy demonstrated that they had deliberately been discriminated against. The court found no evidence of "intentional[] discriminat[ion]" against petitioners (*id.* at 22a) and noted that petitioners' Rule 56(g) affidavit requesting further discovery on this point was "utterly unconvincing" (*id.* at 17a, 22a).

offer was not accepted by Mr. Brancato because, approximately 60 days after petitioners submitted the settlement offer, and before the offer was acted on, a national no-settlement policy was adopted by the National Office of the Internal Revenue Service with respect to Haffner bond issues (Pet. App. 4a-5a). Petitioners' claim (Pet. 6) that the appeals officer deliberately delayed processing of their settlement offer during that 60 day period in an effort to pressure petitioners' counsel into obtaining a job for his daughter was unsubstantiated.

The affidavits of both of the attorneys who represented petitioners before the Internal Revenue Service showed that the appeals officer stated that he would recommend settlement on the basis of including 60 percent of the value of the Haffner bonds in decedent's gross estate. One of petitioners' two representatives, Ms. Feigert, did not even mention in her affidavit the exchange concerning the appeals officer's daughter that occurred after the appeals officer had stated the terms of settlement he would recommend (C.A. App. 221-226). The other, Mr. Blattmachr, indicated that until petitioners brought the present tax refund suit he had not even attempted to ascertain what action was taken on the daughter's resume (*id.* at 229). Neither Ms. Feigert nor Mr. Blattmachr asserted that they thought they were the target of attempted coercion. To the contrary, a letter by Mr. Blattmachr to the appeals officer that accompanied petitioners' calculations of tax under the proposed settlement showed that the two had long been acquaintances and that Mr. Blattmachr had great confidence in the appeals officer (*id.* at 605-606).

As the trial court correctly concluded, petitioners failed to substantiate their claim of attempted coercion "with even a shred of evidence" (Pet. App. 16a).

2. The trial court did not abuse its discretion in denying the request for discovery made by petitioners in the affidavit filed by their counsel pursuant to Ct. Fed. Cl. R. 56(g). In view of the total absence of support—even in the testimony of petitioners' own counsel—for petitioners' assertion that the appeals officer engaged in coercion, there was no plausible basis for further delay or expenditure of judicial resources (Pet. App. 16a). The trial court's discretionary refusal of the discovery requested pursuant to Rule 56(g) was affirmed by the court of appeals. Further review of that inherently factual determination is not warranted.[3]

Petitioners err in contending (Pet. 13) that the result reached in this case conflicts with the decisions in *Burnside-Ott Aviation Training Ctr., Inc.* v. *United States*, 985 F.2d 1574 (Fed. Cir. 1993), and *Connell Rice & Sugar Co.* v. *United States*, 837 F.2d 1068 (Fed. Cir. 1988). In each of those decisions, the court of appeals concluded that the trial court had granted summary judgment based on an incorrect view of the governing law and then declined to affirm the trial court's judgment on an alternative theory as to which no discovery had been allowed. Unlike the situation in *Burnside-Ott* and

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[3] Petitioners' contention (Pet. 12) that the government "misled" the trial court into suspending discovery based on an incorrect view of the governing law, and thereby prejudiced petitioners, is without merit. Petitioners sought what the government characterized as "sweeping" discovery (C.A. App. 64); indeed, petitioners stated in their opening brief to the court of appeals that the discovery they sought was designed to enable them "to explore the inner workings of the New York Appeals Office" (Pet. C.A. Br. 31). The discovery that petitioners sought was denied because not even their own counsel vouched for the frivolous accusations of attempted coercion by the appeals officer (Pet. App. 16a-17a).

Connell, the trial court in the present case denied petitioners' request for discovery pursuant to Rule 56(g) and granted summary judgment to the government based on a view of the governing law that petitioners contends is *correct*. Petitioners emphasized in their brief to the court of appeals that they "agree[d] with the legal test adopted by the trial court" (Pet. C.A. Br. 2). The decision in the present case is thus consistent with the court of appeals' own earlier decisions in *Burnside-Ott* and *Connell*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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